IN THE

Supreme Court of the United States

OCTOBER TERM, 1969
NO. 726

CHARLENE MITCHELL, et al.,

Appellants,

vs.

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota, and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF THE CASE AND JURISDICTION

Appellees accept Appellants' Statement of the Case, and the Jurisdictional Statement. Appellees, however, assert that the order of the three-judge District Court for the District of Minnesota is not appealable to this Court pursuant to 28 U.S.C. §1253.

STATUTES INVOLVED

28 U.S.C. §1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

POSITION OF THE UNITED STATES

28 U.S.C. §2403 may be applicable in that an Act of Congress, 28 U.S.C. §842, affecting the public interest is drawn in question and the United States is not a party to this appeal. A brief Amicus Curiae was filed in the Court below (see Appendix A, Brief for Appellants), but no appearance has been made in this Court by the United States.

QUESTIONS PRESENTED

1. Does this Court have jurisdiction over an appeal pursuant to 28 U.S.C. §1253, when the order appealed from is not one granting or denying an interlocutory or permanent injunction?
2. Did the three-judge District Court properly dismiss the amended complaint for failure to present an actual controversy?
3. Does 50 U.S.C. §842 apply to elections for presidential electors, so as to bar the use of the political party designation "Communist Party, U.S.A." on the state ballot?

4. Is the Communist Control Act of 1954 a proper constitutional response to the duty of Congress to secure and protect a republican form of government when balanced against a claimed violation of the constitutional provisions which guarantee freedoms of speech, press, and assembly; and which outlaw bills of attainder?

SUMMARY OF ARGUMENT

1. *This is not an appealable order.* The November, 1968 general election rendered moot appellants' prayer for injunctive relief. The dismissal of the amended complaint denied a request for declaratory relief rather than a plea for a temporary or permanent injunction.

28 U.S.C. §1253 allows an appeal only from "an order granting or denying . . . an interlocutory or permanent injunction . . . ." The order appealed from in this case is not such an order. *Goldstein v. Cox,* 90 S. Ct. 671 (1970).

2. *The complaint fails to present an actual controversy.* Communist Party candidates were ordered placed upon the 1968 general election ballot, thus rendering moot requests for temporary and permanent injunctions. The complaint was thereafter amended to allege intended future participation in Minnesota elections and the adherence of the Attorney General to views previously expressed. Because of the contingencies involved, including (a) no strong state policy prohibiting any political organization from fielding candidates; (b) the views of the United States which raised questions concerning the constitutionality of the Act; (c) the views of the District Court to the same effect; and (d) the poor showing of the Communist candidates in 1968, there is no "actual controversy" between the parties at this time. Neither appellee will be in office after November, 1970, and it is not known whether

the same position will be taken by a future Attorney General. In short, there is a probability that the Communist Party, U.S.A., will not run candidates; but, if it does, there may be no legal obstacles to placement of the Party on the ballot.

3. *The Act is applicable and controlling.* None of the parties to this appeal disputes the applicability of the Communist Control Act to the 1968 Minnesota general election. U.S. Const. art. II, §1, cl. 2, is not an absolute prohibition against congressional protection of the elective process. The power to protect the integrity of the elective process necessarily includes the power to restrict access to the ballot to those groups which espouse a system of government which is republican in form.

4. *The Communist Control Act of 1954 is constitutional.* After extensive investigations, Congress determined that the Communist Party of the United States was an instrumentality of a foreign-based conspiracy to overthrow the Government of the United States by any means necessary, including force and violence. Acting pursuant to the powers to provide for the common defense and the duty to guarantee a republican form of government, Congress "outlawed" the Party and abolished all of its rights, privileges and immunities.

In determining whether the Communist Control Act of 1954 violates first amendment protections or constitutes a bill of attainder, the Court must necessarily balance the evils sought to be regulated against the restrictions imposed upon groups or individuals by the Act. The Act neither deprives individuals of basic freedoms, nor proscribes any group other than the Communist Party. The statute is narrowly and restrictively drawn and brings under its prohibitions only the Communist Party of the United States. The Act is a proper legislative response to the threat found to exist in the Communist Party of the United States.

ARGUMENT

I

A Direct Appeal to This Court Pursuant to 28 U.S.C. §1253 Is Impermissible, as the Order Dismissing the Complaint Could and Did Refer Only to the Prayer for a Declaratory Judgment, the Prayer for Injunctive Relief Having Been Rendered Moot by the General Election.

Appellants' original prayer for relief contained requests for temporary and permanent injunctions requiring appellee Donovan to: 1) accept and file the petition for nomination; and 2) place the names of the Communist Party candidates upon the ballot for the general election held November 5, 1968. Temporary relief was granted by an order of the three-judge District Court. *Mitchell v. Donovan*, 290 F. Supp. 642 (D. Minn. 1968). Subsequent to that action, but prior to the election, appellants moved to amend their complaint by alleging a determination to participate in future Minnesota local, state and national elections, and by alleging, upon information and belief, the determination of appellee Head to render an opinion that the Communist Control Act of 1954 bars the national and state Communist Parties from participation in such elections.

Appellants chose *not* to amend their prayer for relief. Thus, subsequent to the 1968 general election, the prayer for relief sought only a declaratory judgment, the request for injunctive relief having been rendered moot by the election. Appellants' motion to amend was granted as was appellees' motion to dismiss the action as moot. *Mitchell v. Donovan*, 300 F. Supp. 1145 (D. Minn. 1969).

Appellants' appeal was taken pursuant to 28 U.S.C. §1253. However, the order is *not* appealable as it is not one which granted or denied an interlocutory or permanent injunction. The order dismissed appellants' complaint for declaratory relief.

This identical issue was raised in appellees' "Motion to Dismiss, or, in the Alternative, to Affirm the Judgment Entered Below." Probable jurisdiction, however, was noted on January 12, 1970. On January 26, 1970, this Court decided *Goldstein v. Cox*, 90 S. Ct. 671, which decision, in the opinion of appellees, compels a further discussion of section 1253 appellate jurisdiction.

In *Goldstein*, plaintiffs requested temporary and permanent injunctive relief against the operation of a New York statute which requires an alien's share of a New York estate to be paid into court when it appears that the alien would not have the benefit, use, or control of the money. After an intermediate appeal, appellants moved for summary judgment, requesting "the relief prayed for in the complaint." A three-judge District Court denied the motion, but did not dismiss the action. Appellants then appealed from the order denying summary judgment, under 28 U.S.C. §1253.

This Court determined that the appeal was improperly taken, since the power to review under section 1253 was limited to an order granting or denying a preliminary injunction.

Although plaintiffs in *Goldstein* requested injunctive relief in the original complaint, they took no practical steps to obtain such relief. No separate application for a preliminary injunction was filed, nor did they urge the appropriateness of temporary relief. The order, therefore, was not an order granting or denying a preliminary injunction, and hence was not appealable under section 1253.

In the instant case, appellants did request injunctive relief in the original complaint, but the prayer for relief was not amended subsequent to the general election. At the time of the hearing on the motion to amend, there was no request for an interlocutory or permanent injunction pending before the court. The only remaining prayer was for a declaratory judgment declaring the Communist Control Act of 1954 unconstitutional. The three-judge District Court so stated in the first sentence of its opinion:

> We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief . . . .

300 F. Supp. at 1146.

As in *Goldstein* appellants took no steps toward obtaining temporary or permanent injunctive relief; they did not file an application for an injunction nor did they urge the appropriateness of injunctive relief, subsequent to the election. The order of dismissal, therefore, could not and did not pertain to the request for injunctive relief, but only to the request for a declaratory judgment. The order is, therefore, not appealable because it did not grant or deny an interlocutory or permanent injunction.

The interpretation of section 1253 in *Goldstein* is in accord not only with the historical development of that statute, but also with the rule that the appellate jurisdiction of this Court is to be narrowly construed under the Three-Judge Court Act. See *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317 (1926); *Phillips v. United States*, 312 U.S. 246 (1941); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

Appellants in their Jurisdictional Statement cited *Clark v.*

Poor, 274 U.S. 554 (1927), and *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), as sustaining the present jurisdiction of this Court to review the judgment on direct appeal pursuant to section 1253. In those cases, however, plaintiffs requested injunctive relief in their complaints, the complaints were dismissed and the appeals taken from the orders of dismissal. In the instant case, there was no dismissal of a request for injunctive relief, because the only injunctive relief prayed for pertained to the election of November 5, 1968.

For the above stated reasons[1] this Court lacks jurisdiction over the appeal, and therefore the same must be dismissed.

II

The Trial Court Properly Dismissed the Amended Complaint for Failure to Present an Actual Controversy.

A. *The Complaint.*

In July, 1969, the three-judge District Court granted plaintiffs' motion to amend their complaint by adding paragraphs XXV and XXVI thereto, which allege:

XXV

> The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local,

[1] See "Brief in Support of Motion to Dismiss Appeal or, in the Alternative, to Affirm the Judgment Entered Below," for additional grounds in support of appellees' contention that the Court lacks jurisdiction over the appeal.

state, and national elections subsequent to the November 5 Minnesota General Election.

Appendix 13

XXVI

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their endorsement from participating in any local, state, or national election in the State of Minnesota.

Appendix 14

In support of the motion to amend, the affidavit of Mrs. Betty M. Smith, Secretary of the Communist Party of Minnesota, was filed. Appendix 60-62. The only relevant statement contained therein is that "the *Communist Party of Minnesota* will continue to *participate* in national, state, and local elections in the State of Minnesota." (Emphasis added.) The affidavit makes no reference to the future plans or intentions of the Communist Party, U.S.A., nor does it state with particularity the manner in which the Communist Party of Minnesota will participate in future elections.

The District Court dismissed the amended complaint

(a) as "moot";

(b) as "inappropriate for adjudication"; and

(c) for the reason that the issues "do not present a 'controversy' as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U.S.C.A. §2201."

300 F. Supp. at 1147.

The rationale underlying the dismissal is perhaps best expressed by the following language of the Court:

> All the plaintiffs assert here is a 'hypothetical threat' of a possible constitutional issue as yet unframed.

300 F. Supp. at 1150.

B. *The Action Is Moot and There Is No Actual Controversy.*

Appellants do not contend that the original complaint is not moot. The relief requested, by way of a temporary injunction, has been granted. Appellants appeared on the ballot and received 415 votes out of a total of 1,606,307 ballots; the 1968 election is history; and there is no further relief available with respect to that election.

The United States Constitution, art. III, §2, and the Declaratory Judgment Act, 28 U.S.C. §2201, make it a precondition to the grant of any relief that an actual controversy exist between the parties to the litigation:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

28 U.S.C. §2201.

"Actual controversy" has been defined variously,[2] and it contemplates a real, as opposed to a hypothetical, dispute between parties having adverse legal interests of sufficient immediacy and reality to warrant determination by the courts. See *Zwickler v. Koota*, 389 U.S. 241 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958). The constitutional standard for the basis of federal jurisdiction that there be an actual "case or controversy" is not in any way affected by having the Declaratory Judgment Act extant. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937). In fact, as the court below recognized, the

> constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense more exacting, for, '[t]he Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declara-

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[2] As stated in *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243-44 (1952):

> (W)hen all of the axioms have been exhausted and all words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as conversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.

> tion of rights; it did not impose a duty to do so.' *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111 . . . (1962).

300 F. Supp. at 1147.

The key word in the phrase is "actual." Below, the temporary injunction, issued October 2, 1968, sufficed to give appellants all of the relief they possibly could have achieved with respect to the general election. Appellees complied fully with the Court's mandate. The claimed intention of appellants to participate in Minnesota elections on unspecified future dates, and the "information and belief" as to what appellee Head will advise Minnesota election officials to do were apparently sufficient, in appellants' opinion, to create the required "actual controversy" between appellees and them. The court below quite properly found that the controversy was at best hypothetical.

A number of events have occurred since the issuance of the September 9, 1968 opinion by the Attorney General which could affect the State's position if the issue were ever presented again. *First*, this action was commenced resulting in a temporary order placing the Communist candidates on the ballot. *Second*, the position of the United States has been enunciated; and although it is erroneous with respect to the application of the Communist Control Act to these proceedings, its approach to the constitutional questions cannot be ignored. *Third*, two of the three judges below expressed "grave" doubts concerning the Act's constitutionality and the third, in effect, said the constitutional issues were not free from doubt. *Fourth*, the Communist candidates garnered only 415 votes in the election, notwithstanding the publicity attending the litigation and the "tightly scheduled campaign program"

Appendix 39, conducted by the candidates. *Fifth*, the opinion of the three-judge District Court, dismissing the complaint, strongly suggests that a different course of action by the Attorney General would be preferable if the question were again presented. Finally, both appellees Head and Donovan have declared publicly that they will not be candidates for re-election to their respective offices in November, 1970, the next statewide election.

Each of the above factors would necessarily be considered by an Attorney General in determining what course of action he should follow. There is no way today that we can predict what result would be reached.

In addition, the opinions of the Attorney General of Minnesota do not have the force and effect of law. Minn. Stat. 1967, §§ 8.02 and 8.07. Minnesota has no statute remotely comparable to the Communist Control Act, and its election laws do not in any way attempt to dictate the policies of the parties which seek to run candidates on the state ballot. The method under which a minority party is placed on the state ballot by petition is not arduous. See Minn. Stat. 1967, § 202.09 and 202.10. In short, there is nothing to indicate by statute or otherwise, a firmly imbedded state policy which would lead to the probable certainty that this "controversy" will ever be joined again.

Concurrent with the uncertainty of the position, if any, of a future Attorney General, is the equal uncertainty whether the Communist Party, U.S.A., will ever again present candidates for election in the State of Minnesota. On November 3, 1969, there were held numerous contests throughout the state to elect persons to serve as mayors, councilmen, and members of various other representative bodies. At no such election did the Communist Party, U.S.A. attempt to field a candidate.

It should also be noted that the allegations of the amended complaint do not state with certainty that Communist candidates will run for office under the party label, Communist Party, U.S.A. In fact, the use of the terminology "participate" encompasses a wide range of activities not within the prohibition of the Act.

This Court on several occasions has addressed itself to the question of what is an actual controversy. As was stated in *Mills v. Green*, 159 U.S. 651 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Id. at 653.

See, also, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947):

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field.

Id. at 89.

* * * * *

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection

> against actual interference. A hypothetical threat is not enough. . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Id. at 90.

* * * * * *

> It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . .'

Id. at 90, n. 22.

And see *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, *supra:*

> The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal inter-

ests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

312 U.S. at 273.

It is probably fair to assume that shortly prior to the presidential election of 1972 will be the first *opportunity* for the "controversy" to become "actual." The named appellees will not be in their respective offices if Communist Party candidates' petitions are then presented; and, their successors will undoubtedly recall the temporary injunction issued in October of 1968, and may consider the adamant refusal to accept a similar petition to be futile. The Party ran no candidates in Minnesota at all from 1949 to 1968: and the results in 1968 were abysmally pathetic. In this context, it would be inappropriate for this Court to issue an advisory opinion—as such is all a decision on the constitutional validity of sections 841 and 842 could be with respect to the parties herein—predicated upon issues which are now moot and which never again may arise.

C. *Recent Decisions Compel Affirmance.*

Moore v. Ogilvie, 394 U.S. 814 (1969), does not support appellants' position that this action is "capable of repetition, yet evading review." The attack in *Moore* was aimed at a 1935 Illinois statute requiring at least 25,000 electors to effectuate a valid nominating petition, which statute had been upheld in *MacDougall v. Green*, 335 U.S. 281 (1948). Thus, the Illinois system was so well entrenched by statute and judicial construction as to make it almost certain that it would not be changed. It was also clear that the area affected all future elections and represented a "continuing controversy in the

federal-state area where [the Supreme Court's] 'one man, one vote' decisions have thrust." 394 U.S. at 816.

The contrast between the Illinois statute, with its judicial construction, and the case at bar is clear. Here there was merely a written memorandum of an Attorney General, followed by expressions of the federal judiciary, and of the United States, raising questions as to the constitutionality of the Act; followed by a pathetically weak showing at the polls by the very party which now wishes all to believe that it will certainly try again.

More apposite is *Hall v. Beals*, 90 S.Ct. 200 (1969), in which this Court dismissed, as moot, a complaint challenging Colorado's six month residency requirement for voting in presidential elections. *Moore* was explained as follows:

> The problem before us was 'capable of repetition, yet evading review,' not only because the same restriction on Moore's candidacy that had adversely affected him in 1968 could do so again in 1972, but because Illinois, far from having altered its statutory scheme for the future benefit of those situated similarly to Moore, had adhered for over 30 years to the same electoral policy with no indication of change.

90 S.Ct. at 202.

Minnesota has no firm policy in this regard, much less one of 30 years' standing. It is speculative to assert that in 1972 these parties will be in conflict, and "speculative contingencies afford no basis for our passing on the substantive issues. . . ." *Hall v. Beals*, 90 S.Ct. at 202.

The instant case was appropriate for the exercise of the judicial restraint envisaged by the Declaratory Judgment Act. Just as the constitutionality of the Communist Control Act

has been called doubtful, so is the proposition that the parties to this litigation will ever again find themselves in conflict. There are simply too many contingencies involved. This is not the setting in which "grave" constitutional issues should be determined.

As stated in *Public Affairs Press v. Rickover*, 369 U.S. 111, (1962):

> Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' *Eccles v. Peoples Bank*, 333 U.S. 426, 431. We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations.

Id. at 112.

See, also, *Golden v. Zwickler*, 394 U.S. 103 (1969), dismissing a declaratory judgment action for failure to present an actual controversy:

> No federal court, whether this court or a district court, has 'jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies*' . . . the express limitation of the Declaratory Judgment Act to cases 'of actual controversy' is explicit recognition of this principle.

Id. at 110.

The order appealed from should be affirmed.

III

The Communist Control Act of 1954 Is Applicable to State Elections for Presidential Electors and Is Consistent with the Provisions of U. S. Const. Art. II, § 1, Cl. 2.

A. *The Communist Control Act of 1954 Prohibits the Communist Party from Placing Candidates on the Ballot in Any Election.*

The debates in Congress demonstrate conclusively that one of the primary objects of section 842 was to prevent the very actions sought to be achieved in the instant case. See, 100 Cong. Rec. 13837, 14082, 14087, 14092, 14909 (daily ed. Aug. 17, 1954). Senator Kefauver stated that the party "could not be placed on the ballot . . ." Representative Celler stated that "The Communist Party cannot appear on the ballot, . . . cannot appear in any election." See, also, Note, "Communist Control Act of 1954," 64 *Yale L. J.* 712, 738 (1955).

In addition, in section 841, Congress found that the Communist Party was not a political party. This is further evidence of the intent of Congress to prohibit the Party from participating in the election process, the normal manner in which political parties are able to express their philosophies.

In the only case under the Act involving elections, the Supreme Court of New Jersey held the Act applicable and constitutional.[3] *Salwen v. Rees*, 16 N.J. 216, 108 A. 2d 265

[3] See also *Communist Party, U.S.A. v. Catherwood*, 168 N.E. 2d 242 (1960), where the Court of Appeals rejected arguments by petitioner that the Act was unconstitutional. Although the judgment of the Court of Appeals was reversed on other grounds, 367 U.S. 389 (1961), its conclusion on the constitutional issues was not disturbed.

(1954); see also *Op. Atty. Gen., Conn.*, 1964, Brief for Appellants 20-21; "Federal Anti-Subversive Legislation of 1954," 55 *Colum. L. Rev.* 631, 706-08 (1955); "The Communist Control Act of 1954," 53 *Mich. L. Rev.* 1153, 1159 (1955); Auerbach, "The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech," 23 *U. Chi. L. Rev.* 173, 175 (1956).

On this issue, appellees are in accord with appellants and in opposition to the position of the United States. Not only the Act, but the statutory framework of the Minnesota election law, compel the conclusion that the use of the term "Communist Party, U.S.A." as a political party was prohibited in the 1968 general election.

It should also be underscored just what Congress was not outlawing through the passage of the Communist Control Act. The Act does *not* proscribe: (1) membership in the Communist Party; (2) advocacy of Communist Party tenets; (3) voting for candidates who are known or suspected to be communists; or (4) the political candidacy of Communist Party members who do not stand for election under the banner of that party. Small "c" communism as a theory of economic development and regulation is, in itself, as entitled to espousal and implementation as any other geopolitical theory. U.S. Const. amend. I.

B. *The Power with Respect to Presidential Elections.*

Appellants assert that sections 841 and 842, as applied here, violate the provisions of U.S. Const. art. II, §1, cl. 2 which provide:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,

> equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

This provision does not constitute an absolute prohibition against any congressional control over the appointment of the presidential electors. It is well settled that congressional authority is not limited to merely determining the time of choosing the presidential electors. *Burroughs & Cannon v. United States*, 290 U.S. 534 (1934); Auerbach, "The Communist Control Act of 1954," *supra*. In *Burroughs*, this Court dismissed a constitutional attack against a provision of the Federal Corrupt Practices Act which imposed filing and reporting requirements on political committees accepting contributions or making expenditures for the purpose of influencing the election of presidential electors. In upholding the constitutionality of the statute, this Court stated:

> The only point of the constitutional objection necessary to be considered is that the power of appointment of presidential electors and the manner of their appointment are expressly committed by § 1, Art. II, of the Constitution to the states, and that the congressional authority is thereby limited to determining 'the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.' *So narrow a view of the powers of Congress in respect of the matter is without warrant.*

290 U.S. at 544 (emphasis added).

This clearly indicates that congressional power extends to taking necessary action to preserve the general government when threatened by force:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. *Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.*

Id. at 545 (emphasis added).

That Congress is not completely without power to legislate concerning the processes by which the President of the United States is elected is well settled. In *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), the Court said:

> . . . United States v. Classic, 1941, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, 'establishes the authority in Congress to legislate concerning any and all elections affecting Federal officers, whether general, special or primary, as long as they are an integral part of the procedure of choice or where in fact the primary effectively controls their choice.'

Id. at 350.

The Court enjoined the Klan from acting to interfere with and coerce Negro citizens attempting to register to vote, and upheld the voting provisions of the Civil Rights Acts of 1957 and 1964, and their applicability to elections of presidential electors, against a challenge that they were in violation of U.S. Const. art. II, § 1. Relying on *Burroughs*, the Court stated:

> The states' power over the manner of appointing presidential electors is similar to the states' reserved power to establish voting qualifications. Notwithstanding this unquestioned power in the states, '*Burroughs* holds that "Congress" has the implied power to protect the integrity of the processes of popular election of presidential electors once that mode of selection has been chosen by the state.' There is an obvious parallel between corruption of the federal electoral process by the use of money and corruption of the same process by acts of violence and intimidation that prevents voters from getting on the registration rolls or, indeed, from ever reaching the registration office.

250 F. Supp. at 354.

IV

Upon a Balancing of the Duty of Congress to Secure and Protect a Republican Form of Government to the States Against the Protection of the "Rights" of an Organization Whose Purpose Is the Overthrow of Such Republican Governments by Any Means Necessary, the Communist Control Act of 1950, 50 U.S.C. §§ 841 and 842 Is Shown to Be a Constitutional Response to the More Compelling Congressional Duty.[4]

A. *Congress Had the Constitutional Power and Duty to Enact the Communist Control Act of 1954.*

Congress had a constitutional right and duty to act, not only in its own behalf, but also on behalf of the several states, to resist effectively foreign subversion, whether internal or external:

> Means for effective resistance against foreign incursion—whether in the form of organizations which function, in some technical sense, as 'agents' of a foreign power, or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power—may not be denied to the national legislature. *'To preserve its independence, and give security against foreign aggression and encroach-*

[4] It is the position of appellees that this litigation is now moot, and fails to present an actual controversy. Should this Court determine, however, that the action is not moot, it is further appellees' position that the matter should be remanded to the District Court for a decision on the merits. The District Court has not yet passed upon any of the constitutional issues presented and it should be allowed to do so before a ruling by this Court.

> *ment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.* It matters not in what form such aggression and encroachment comes. . . .'

Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 95-96 (1961) (emphasis added).

The constitutional basis of this congressional power is made clear in the Preamble to the Federal Constitution:

> We The People of the United States, in order to . . . insure domestic Tranquility, . . . provide for the common defence, . . . do ordain and establish this Constitution for the United States of America.

The substantive constitutional grants of power are found in art. I, § 8, cl. 1:

> The Congress shall have Power To . . . provide for the common Defense . . . of the United States; . . .

and in art. IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . .

With respect to congressional action providing for the common defense, it was said in *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951):

> The power of Congress to legislate concerning the national defense includes power to declare war, to raise and support armies, to provide and maintain a navy, as well as the power to make all laws necessary and proper for carrying into execution the foregoing

> powers. These powers necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, *as well as against endeavors to subvert, undermine, or overthrow the government.*

Id. at 261 (emphasis added).

Insofar as the power of Congress is based upon art. IV, § 4, see *Oil Workers International Union v. Elliott*, 73 F. Supp. 942 (N.D. Tex. 1947).

Congress has the constitutional duty to guarantee to every state a republican form of government. Basic to this concept is that Congress recognize, as it has, that the sole legitimacy of a republican form of government is the flow of authority and responsibility to the government from the consent of the governed. A republican form of government is not guaranteed when Congress fails, or refuses to (or is prevented from), enact reasonable prophylactic measures to insure that the will of a few foreign-based individuals is not imposed upon the governed with or without its consent.

In attempting to fulfill its duty under art. IV, § 4, Congress, after following accepted principles of due process, and upon substantial competent and material evidence, justifiably determined in section 841 that the

> Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore, the Communist Party should be outlawed.

A State's refusal to follow section 842 would violate both the congressional power to determine how to guarantee a re-

publican form of government in the States, and the Supremacy Clause.

It is certainly a reasonable condition and a reasonable qualification, imposable by the Congress as a pre-condition for placing a "party" on a State ballot, that it in fact be a political party. In 1968, Minnesota, acting pursuant to the Act, in no way attempted to keep any bona fide party off the ballot no matter how "unorthodox" its ideas were.

The key distinction between allowing an organization with views akin to the Communist Party on the ballot and keeping the Communist Party, as such has been found to exist, off, is that the latter seeks and follows guidance not from the American electorate but from foreign sources over which the American voters have no control. For Congress not to proscribe the facilitation of this result would be a derogation of its responsibilities to insure a republican form of government to the States.

In *Dunne v. United States*, 138 F. 2d 137 (8th Cir. 1943), an anti-subversive federal statute was attacked upon the ground of lack of legislative power. The Court stated:

> Appellants state that 'This statute must seek its validating force in the vague and undefined "right of self-preservation."' No such extremity exists. The statute is grounded upon specific Constitutional grants of power. The Preamble, setting forth the purposes of the Constitution, includes to 'insure domestic Tranquility' and to 'provide for the common defence,' as well as to 'secure the Blessings of Liberty.' Article 1, § 8, cl. 1 specifically grants to Congress the power to 'provide for the common Defence.' Clause 18 grants the power 'To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Article IV, § 4 is 'The

> United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion,' and, upon application, 'against domestic Violence.'

Id. at 140.

The general power of Congress not only to conduct inquiries in this area, but to legislate on the basis of the information thus obtained, has been recognized repeatedly by this Court. *E.g., Barenblatt v. United States*, 360 U.S. 109 (1959), where it was stated:

> That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court. . . . In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society.'

Id. at 127-28.

The findings contained in section 841 were the result of extensive congressional investigations and legislation. See, committee reports, *Communist Party v. Control Board*, 367 U.S. at 94, n. 37; see, also, Subversive Activities Control Act of 1950, 50 U.S.C. 781. Even prior to the enactment of the Communist Control Act of 1954, the courts had recognized the objects of the Communist movement and had taken judicial notice of the threats which that movement posed. See *Martinez v. Neelly*, 197 F. 2d 462 (7th Cir. 1952), *aff'd*, 344 U.S. 916 (1953); *Carlson v. Landon*, 187 F. 2d 991 (9th Cir. 1951), *aff'd*, 342 U.S. 524 (1952); *Nat'l Maritime Union of America v. Herzog*, 78 F. Supp. 146 (D.D.C. 1948); *In re McKay*, 71 F. Supp. 397 (N.D. Ind. 1947).

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated power. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Although courts may make inquiry to determine whether there is a reasonable basis for the legislative action, the inquiry is limited to the question of reasonableness. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934); *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924).

Here, Congress recorded in section 841 the basis for its action, the threat to the United States presented by the Communist Party. See *Barenblatt v. United States*, 360 U.S. at 127-29, and *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382 (1950), Mr. Justice Jackson, concurring:

> From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system.

Id. at 424.

In short, the legislative findings in section 841 are "[t]he reasons for the exercise of the power" by Congress, *Carlson v. Landon*, 342 U.S. at 535. Further, as this Court said, with respect to similar findings, in *Galvan v. Press*, 347 U.S. 522 (1954):

> On the basis of extensive investigation Congress made many findings, including that in §2(1) of the Act

> that the 'Communist' movement . . . is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

Id. at 529.

In *Communist Party v. Subversive Activities Control Board*, 223 F. 2d 531 (D.C. Cir. 1954), *rev'd*, 351 U.S. 115 (1956), the Court of Appeals said:

> In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of fact in cases in which constitutional questions are posed. Since then the Supreme Court has resolved the problem in American Communications Ass'n v. Douds and Galvan v. Press, both supra. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt these findings.

223 F. 2d at 565.

In the second decision in the *Communist Party v. Subversive Activities Control Board, supra,* this Court, after restating the congressional findings, reiterated the position set forth above:

> It is not for the courts to re-examine the validity of these legislative findings and reject them . . . . They are the product of extensive investigation by Committees of Congress over more than a decade and a half. . . . . We certainly cannot dismiss them as unfounded or irrational imaginings.

367 U.S. at 94-95.

In view of the evidence adduced by congressional investigations, the taking of judicial notice of similar facts, and the express recognition of the reasonableness and rationality of the congressional findings by this Court, the findings of section 841 must be accepted at this time.

B. *The First Amendment Is Not Violated.*

It must be conceded that the Communist Control Act, in prohibiting the Communist Party, U.S.A., from appearing on the ballot, denies to individuals the right to vote for electors who insist upon the use of the Communist Party, U.S.A., label. Whether the alleged deprivation of individual freedoms is sufficiently grave so as to require a declaration of the unconstitutionality of the Act is the fundamental issue. It should be also noted, however, that there is no deprivation of certain freedoms and rights. All of the plaintiffs can vote; they can vote for any individual, including members of the Communist Party. The candidates insisted upon the use of the party designation—Communist Party of the United States, thus disabling themselves from participation in the election.

There is no better settled principle of constitutional law than that the freedoms guaranteed by the first amendment are not absolute. Even direct limitations on the freedoms, otherwise protected by that amendment, are permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Dennis v. United States*, 341 U.S. 494, 509-10 (1951).[5]

Also, in *Communist Party v. Control Board, supra*, this Court stated:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation cause to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

367 U.S. at 91.

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[5] There are numerous examples of laws which place indirect restraints on freedom of speech, but which are nevertheless valid because the statute's objective lies within the power of Congress to bring about, and the restraint is a necessary and appropriate concomitant of the exercise of that power: (1) the Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns. *United Public Workers v. Mitchell, supra;* (2) the Federal Regulation of Lobbying Act (2 U.S.C. §§ 264, 266-67), validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to disclose "who is being hired, who is putting up the money, and how much." *United States v. Harriss*, 347 U.S. 612, 625, (1954); (3) the Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep accounts of contributions and to report publicly contributors as well as persons to whom such expenditures are made (2 U.S.C. §§ 241-44); *Burroughs v. United States, supra;* (4) the Foreign Agents Registration Act validly requires agents of foreign principals to register with the Attorney General and to submit detailed information relating to the agency relationship (22 U.S.C. 611 ff.); *United States v. Peace Information Center*, 97 F. Supp. at 261-63.

In prior cases, the fact that incidental and indirect restraints upon "first amendment freedoms" resulted from the steps taken by Congress to combat those evils was held not to invalidate the legislative remedy adopted.[6] However, the evils at which those statutes were directed, grave as they were, were relatively trivial compared to the evil at which this Act attempts to strike.

The evil here is the threatened destruction, through force, violence and deceit, of our national independence and of our liberties, and the passing of the nation under the domination of a foreign dictatorship. The Communist Party, Congress declared in summing up the purposes of the Act, presents "a clear present and continuing danger to the security of the United States."

It is obviously a matter of the gravest concern that there exists in this country such a highly organized conspiratorial group controlled and dominated by a foreign country. Congress has always regarded the threat to the United States represented by the Communist movement as a legitimate subject of inquiry and legislation. See, *Internal Security Manual*, S. Doc. No. 47, 83d Cong., 1st Sess., 216-18, where the many hearings held by committees of Congress investigating subversive activities from 1930 to 1953 are synopsized.

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[6] The evil aimed at by the Hatch Act was the bad effect on government service of "political activity by government emp oyees." *United Public Workers v. Mitchell*, 330 U.S. at 95. The Regulation of Lobbying Act was aimed at the danger that "the voice of the people" might go unheard by Congress due to being "drowned out by the voice of special interest groups seek ng favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. at 625. The harm sought to be eliminated by the Corrupt Practices Act was "the corrupt use of money to affect elections." *Burroughs v. United States*, 290 U.S. at 548.

The question is not whether some indirect, incidental restraint on individual freedom might result from the enforcement of a law. That there would be some such restraint is apparent. The question is whether the objective of Congress was one within its power to seek to effect, and, if so, whether the incidental restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law, as well as the nature, impact, and scope of the restraint. In an analogous context, the problem was bounded by this Court in *American Communications Ass'n v. Douds, supra,* as follows:

> In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evil of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'

339 U.S. at 400.

This Court repeatedly has refused to treat the Communist Party as an ordinary political party in considering the constitutionality of statutes or congressional investigations under the first amendment.

Mr. Justice Jackson in his concurring opinion in *Douds* carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may consti-

tutionally be treated as something different in law." *Id.* at 423. He found that Congress, on the basis of material before it, could rationally have concluded that:

(a) *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.*

Id. at 425;

(b) *The Communist Party alone among American parties past or present is dominated and controlled by a foreign government.*

Id. at 427;

(c) *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.*

Id. at 429; and

(d) *Every member of the Communist Party is an agent to execute the Communist program.*

Id. at 431.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494:

> One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. . . . Here we are faced with something

> very different. The American Communist Party . . . is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. . . . The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. . . . The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait.

183 F. 2d at 212-15.

See, also, *Barenblatt v. United States, supra,* in which this Court upheld the authority of a congressional committee to inquire whether a witness belonged to the Communist Party:

> On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.

360 U.S. at 127-29.

In *United States v. Robel,* 389 U.S. 258 (1967), it was held that section 5(a)(1)(D) of the Subversive Activities Control Act was unconstitutional as being an abridgement of the right of association as protected by the first amendment. That section of the Act made it a crime for a member of a Communist organization to continue employment in any plant designated as a defense facility by the Secretary of Defense. In striking down this section, this Court said:

> When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated.

Id. at 264.

* * * * *

> It has become axiomatic that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'

Id. at 265.

* * * * *

> It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment."

Id. at 262.

Aptheker v. Secretary of State, 378 U.S. 500 (1964), held that section 6 of the Subversive Activities Control Act was unconstitutional as an abridgement of the right to travel. Section 6 prohibited a member of a Communist organization (as defined in the Act), from applying for a passport. This Court stated:

> The clarity and preciseness of the provision in question make it impossible to narrow its indiscriminately cast and overly broad scope without substantial rewriting.

Id. at 515.

The second portion of the test of constitutional validity in the first amendment area, is that the regulatory scheme must be drawn as precisely and narrowly as possible in order to achieve an end so as to avoid indiscriminate infringement upon protected liberties.

The restrictions complained of in *Robel* and *Aptheker* were directed at members of Communist-action organizations *without regard to the quality and degree of membership.* The Communist Control Act, on the contrary, manifests the preciseness required to avoid first amendment infirmities. It does not, through broad language, impose sanctions upon individuals nor attempt to proscribe any group other than the group named therein. The danger found by Congress is the subversive activities of the Communist Party; the remedy is to prevent the Party from enjoying the benefits of the very rights, privileges and immunities the Party seeks to destroy.

First amendment rights are not absolute. The reasonableness of infringement on first amendment rights must be determined by balancing the value to the public of the end sought against the means chosen by Congress to accomplish its goals. The value to the public of the end sought by Congress under the Act, preservation of the nation, comes highest on the scale of public values. The means chosen are rationally related to that end.[7]

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[7] It is stated in appellants' brief that the Act violates the due process clause of the fifth amendment which requires that legislation be "reasonably restricted to the evil with which it is said to deal." It has previously been demonstrated that Congress properly recognized the "evil" and the resulting legislation was properly restricted to that evil.

Complaint is further made that the Party was accorded no hearing on the charges. Obviously extensive hearings were held by Congress and its findings were made. "It is not for the courts to re-examine the validity of these legislative findings and reject them . . . They are the product of extensive investigation by Committees of Congress over more than a decade and a half." *Com-*

C. *The Communist Control Act of 1954 Is Not a Bill of Attainder.*

In *United States v. Lovett*, 328 U.S. 303 (1946), where the Court invalidated, as a bill of attainder, section 304 of the Urgent Deficiency Appropriation Act of 1943, this Court said:

> Legislative acts no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

Id. at 315-16.

More recently, in *Communist Party v. Control Board*, *supra*, the Court once more defined a bill of attainder:

> The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. See *Cummings v. Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333.

367 U.S. at 86.

United States v. Brown, 381 U.S. 437 (1965), iterated the long-standing definition of punishment by quoting from *Cummings v. Missouri*, 4 Wall (71 U.S.) 277:

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munist Party v. Control Board, 367 U.S. at 94. Additionally, no allegation is made in the complaint in this case, or elsewhere, that the findings are not true and accurate.

The discussion with respect to the first amendment is equally applicable here. Congress recognized the evil and took appropriate and effective measures to eradicate it—the elimination of the Communist Party, U.S.A., from the electoral process.

> 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact.'

381 U.S. at 448.

The Communist Control Act of 1954 terminated the rights, privileges and immunities of the Communist Party of the United States or any successor organization. Only the Party, as an organization, is proscribed by section 842; individual members of the Communist Party are not reached by section 842. By legislating to keep the Communist Party of the United States from appearing on a ballot, Congress has not precluded individual members of the Party from voting in any election or from running for any office. In short, the Act does not impose legislative punishment upon individuals when it deprives the Communist Party of the United States of its rights, privileges and immunities as a legal entity, *Albertson v. Communist Party of U.S.A.*, 8 N.Y. 2d 77, 168 N.E. 2d 242 (1960).

The facts in the instant case differ from those considered in *United States v. Brown, supra.* In *Brown*, the Court was examining the constitutionality of section 504 of the Labor-Management Reporting and Disclosure Act of 1959 which made it a crime *for a member of the Communist Party* to serve as an officer of a labor union. The Court found that although the statute referred to membership in the Communist Party, section 504 was a bill of attainder, stating:

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union

> office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

Id. at 450.

In *Brown, supra,* it was explained that the intent of the bill of attainder clause was to implement the separation of powers among the three branches of government by guarding against the legislative exercise of judicial power. It was further determined that the clause is to be liberally construed in the light of its purpose to prevent legislative punishment of designated persons or groups.

Consequently a statute which inflicts a deprivation upon named or described persons or groups which have no means available to escape the deprivation constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, discouraging future conduct. In *American Comm. Ass'n v. Douds, supra,* where the Court upheld section 9(h) of the National Labor Relations Act, the predecessor of section 504, of the Labor Management Reporting and Disclosure Act, construed in *Brown,* the Court stated it had erroneously assumed that only a law visiting retribution for past acts should constitute a bill of attainder:

> The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.

381 U.S. at 449, n. 23.

* * * * *

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts . . . . Instead, it designates . . . the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

Id. at 450.

The element missing then, from appellees' "classic bill of attainder" is the requirement that for a statute to operate as an attainder there must be no avenue open to individuals or organizations upon which the deprivations may be avoided. Here, sections 841 and 842 state that the *Communist Party* may not be on the ballot as presently constituted but it says nothing about, nor does it bar, any candidate who espouses communist principles. The Party need but change its tenets to become eligible for the ballot, and communist candidates are not interdicted at all.

D. *Two Compelling Duties of Congress—to Provide for the Common Defense and to Guarantee a Republican Form of Government to the States—Override Any Technical Impingements Upon Constitutional Freedoms Not Otherwise Absolute.*

Above, appellees have set forth, discussed, and met the objections raised by appellants as to the alleged constitutional infirmities present in the Control Act. However, cases which were decided upon a finding that an individual's rights were

or were not violated by the application of statutes, similar to the Act in intent, within the contexts and meanings of the first, fifth and fourteenth amendments are, at best, merely of tangential precedent for purposes of the present appeal. No court in the United States, with the exception of the Supreme Court of New Jersey, *Salwen v. Reees, supra,* has considered or decided the proposition as such directly is raised by this appeal: Must the sweeping protections, properly and necessarily afforded to individuals and "normal" organizations by virtue of the Constitution, be extended, in all respects and particulars, to an organization found by Congress to be, and which in fact is, an "agency of a hostile foreign power"?

On balance, the answer must be "No".

> The existence as of today of a worldwide conspiracy against free democratic government by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible.

Carlson v. Landon, 187 F. 2d 991, 997 (9th Cir. 1951), *aff'd,* 342 U.S. 524 (1952).

This "perfectly clear and uncontrovertible" finding becomes the predicate for a policy determination by this Court. Given the constitutionally imposed duties of Congress to provide for the common defense and to guarantee a republican form of government to the states, is it proper to relax to a reasonable degree, with respect to specifically determined organizations on a case-by-case basis, the constitutional strictures otherwise applicable? Phrased differently, are the "rights" of an organization whose tenets include the overthrow of the government by any means necessary, including resort to force and violence, equal or paramount to the rights others in society

have to be assured that the policies and practices of the government are changed only in peaceful, democratic ways?

The proposition, and the response to the policy query, transcend the immediate issues raised by the specific application of the Control Act to the Communist Party, U.S.A. Fundamentally at issue are determinations as to the nature, scope, and raison d'etre of "government" as a concept, coupled with what steps "government" may take to preserve itself. The *answers* to the issues posed, and as brought to light through the vehicle of this appeal, are applicable equally when juxtaposed against the "rights" of any group, left or right, which mocks our concepts of the way society should operate and which seeks the violent overthrow and suppression of such concepts, although the particular *application of the answers* may vary.

Long it has been debated whether a society should be allowed to give or vote away its freedoms. Our constitution says, in effect, yes, provided whatever system is substituted be republican in nature.

Appellees do not dispute that Congress or the States are without power, by legislation or administrative actions pursuant to delegations of authority, to prevent candidates and political organizations, otherwise republican in nature, from appearing on the ballot, irrespective of social, economic or political tenets. U.S. Const. amend. I. However, this right of candidates and organizations, republican in nature, to normal access to the ballot must be balanced against the duty of Congress to guarantee to the states that whatever philosophy of government prevails, it must be republican in nature. Republican forms of government are, of course, those which derive power from and which are responsible to the electorate. It is this *form* of government which Congress must guarantee. Guaranteeing to the Communist Party, U.S.A., or to any other

organization which is not republican in form, access to the country's political machinery would hinder, seriously, the fulfilment of the obligation imposed upon Congress by U.S. Const. art. IV, §4.

The answers to these policy inquiries, which must be determined through a balancing process, should technical constitutional infirmities be found in 50 U.S.C. §§ 841 and 842 when the Act is viewed in isolation, must determine the overall constitutionality of the Act.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction, or alternatively, the Order appealed from should be affirmed upon the ground that the District Court properly found that this was no "actual controversy" between the parties.

If the Court determines the constitutional issues presented, it should declare the Communist Control Act of 1954 to be applicable to state elections and not violative of any federal constitutional provisions.

Respectfully submitted,

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